

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Communications Assistance for)
Law Enforcement Act)

CC Docket No. 97-213

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc., on its behalf and on behalf of its subsidiaries, (collectively referenced as "SBC") submits these Reply Comments in response to Comments filed by the Department of Justice and Federal Bureau of Investigation ("DOJ/FBI") with regard to the industry technical standard to meet capability assistance requirements required by the Communications Assistance for Law Enforcement Act ("CALEA" or "the Act"). The DOJ/FBI's basic premise appears to be that it should dictate the terms of CALEA compliance and the carriers should bear the cost, regardless of how exorbitant that cost might be. Clearly, the DOJ/FBI's position that cost should not be a factor in the Commission's determination of an industry technical standard directly contradicts the language of the Act and its legislative history. Moreover, the arguments raised by the DOJ/FBI in support of its inclusion of various capabilities as part of the standard disregards the legislative mandate that such requirements must be "reasonably available." As set forth more fully below, the Commission should disregard the unsupported position advanced by the DOJ/FBI and adopt the interim industry standard without modification.

I. THE ACT REQUIRES THAT COST BE A PRIMARY CONSIDERATION IN THE DETERMINATION OF AN INDUSTRY STANDARD.

The DOJ/FBI goes to great lengths to differentiate between the relevance of cost considerations with regard to the Section 109 concept of "reasonably achievable" and the

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Commission's mandate to establish a viable industry standard under Section 107 which will meet the capability requirements of the Act.¹ By means of a "smoke and mirrors" approach, the DOJ/FBI would seek to distort the clear and unequivocal language of the Act in arguing that cost is not a consideration in developing a technical standard in compliance with the requirements of Section 103, but is applicable only with regard to *how* that standard is met. Yet, there is no ambiguity with regard to the Act's intent.

Section 107(b) clearly sets forth five factors which are to be met in establishing a technical standard, two of which involve a cost analysis. Specifically, Section 107(b)(1) requires the Commission to establish a standard that meets the assistance capability requirements of Section 103 "by cost-effective methods." Section 107(b)(3) mandates that the standard adopted by the Commission must "minimize the cost of compliance on residential ratepayers." Although it acknowledges these provisions, the DOJ/FBI appears to argue that the development of a cost-sensitive technical standard must, by necessity, result in noncompliance with the capability requirements of the Act. There is no question that the objective of this proceeding is to establish a standard which will meet the assistance capabilities of Section 103. No one is contending otherwise. However, Section 103 cannot be read in isolation nor does it take precedence over the clear directives of Section 107. There is no conflict between Sections 103 or 107, except under the interpretation the DOJ/FBI would impose.

Even if we were to follow the lead of the DOJ/FBI and ignore the language of the Act, it is inconceivable that Congress would intend the Commission to establish a technical standard without regard to the cost of implementation. The DOJ/FBI dismisses the probable outcome of its position by stating that if the technical standard is too costly and precludes a carrier from taking advantage of the safe harbor provisions of the Act, the standard does not prohibit a carrier from complying with the Act's requirements.² This

¹ DOJ/FBI Comments, pp. 9-15.

² DOJ/FBI Comments, p. 13.

response is patently illogical; if compliance can be achieved through a more cost-effective means, what is the rationale for adopting a more expensive industry standard? The purpose of the safe harbor provision is to provide needed certainty as to what criteria a carrier should meet in order to comply with debatable general requirements. The establishment of a prohibitively costly technical standard would undercut this objective.

With regard to the provisioning of call-identifying information under Section 103(a)(2), the DOJ/FBI offers no support for its interpretation that the term "reasonable availability" pertains only to technical availability. There is no reason to assume that Congress intended to provide the DOJ/FBI with access to call-identifying information without regard to the financial burden such might place upon a carrier. To the contrary, the House Report language refutes the DOJ/FBI's position that it has been granted by CALEA unrestricted access to this information:

"The second requirement is expeditiously to isolate and enable the government to access reasonably available call identifying information about the origin and destination of communications. Access must be provided in such a manner that the information may be associated with the communication to which it pertains and is provided to the government before, during or immediately after the message's transmission to or from the subscriber, or at any later time acceptable to the government . . . *However, if such information is not reasonably available, the carrier does not have to modify its system to make it available.*" House Report 103-827, at p. 22.

The position of the DOJ/FBI that cost is not a consideration in determining whether call-identifying information is reasonably available³ is unsupportable. If call-identifying information can only be provided at an unreasonable and burdensome expense to the carrier, it is not "reasonably available" and not required by Section 103.

³ DOJ/FBI Comments, p. 28.

II. THE DEFINITION OF "REASONABLY AVAILABLE" CONTAINED IN THE INDUSTRY INTERIM STANDARD IS CORRECT AND CONSISTENT WITH THE INTENT AND PURPOSE OF THE ACT.

The DOJ/FBI contends that the industry interim standard's definition suffers from two flaws. First, it argues that the requirement that the call-identifying information must be present at the Intercept Access Point ("IAP"), "threatens to defeat the central purpose of the statutory scheme" by permitting a carrier to situate its IAPs as it chooses.⁴ It also takes issue with the position that there is no obligation to modify network protocols solely for the purpose of providing call-identifying information to law enforcement. Second, the DOJ/FBI deems "problematic" the requirement that call-identifying information be present at an IAP for call-processing purposes.⁵

In making its arguments, the DOJ/FBI does not explain why the position taken by the telecommunications industry does not appropriately assess the reasonable availability of call-identifying information. Simply because law enforcement may wish access in a different fashion to what it argues is call-identification information does not mean that the definition set forth by the industry is flawed. As SBC stated in its Comments,⁶ the Commission should consider four general factors in determining if information requested by law enforcement is reasonably available: (1) cost; (2) the development period; (3) the manufacturers' assessment of technical/technological feasibility and platform implementation; and (4) logistics. Taking these factors into consideration, the provisioning of information present at the IAP meets the reasonably available standard. To require a carrier to modify its network protocols solely to respond to law enforcement's demands does not meet the standard and is unnecessary for purposes of CALEA compliance.

⁴ DOJ/FBI Comments, p. 22.

⁵ DOJ/FBI Comments, p. 3.

⁶ SBC Comments, pp.4-5.

As explained in greater detail in our earlier Comments⁷ there is a disagreement between the telecommunications industry and the DOJ/FBI as to what type of information constitutes "call-identifying information." The DOJ/FBI argues that the definition of "reasonably available" contained in the interim industry standard excludes the provisioning of post cut-through dialed digits. However, it is the position of SBC and the industry that this information does not constitute call-identifying information. Credit card numbers and automated queuing system responses are unrelated to call routing and completion. Moreover, the delivery of this information would not protect the privacy of certain content communications, the interception of which has not been lawfully authorized. For this reason, the definition of "reasonable availability" contained in the interim industry standard would not preclude law enforcement's obtainment of that information to which it is entitled.

With regard to the use of information which has been traditionally available under pen register and trap-and-trace authorizations for purposes of determining that information which is reasonably available, SBC agrees to an extent with the DOJ/FBI that such precedent is an appropriate reference point. However, the amendment to the pen register statute cited by the DOJ/FBI requires clarification. The modification states that law enforcement agencies authorized to install and use a pen register must use reasonably available technology that "restricts the recording or decoding of electronic or other impulses to the *dialing and signaling information utilized in call processing*" refers to the information utilized by the *carrier*, not the subscriber.

On the question of the extent to which capacity requirements should effect the Commission's determination of an industry technical standard, contrary to the DOJ/FBI's assertions,⁸ capacity and capability requirements are intertwined because manufacturers must take capacity requirements into account when designing and engineering CALEA

⁷ SBC Comments, pp. 13-14.

⁸ DOJ/FBI Comments, pp. 28-29.

compliant equipment. It is not simply a matter of "adding more lines." Rather the DOJ/FBI comments in this regard and with regard to a number of issues raised in this proceeding evidences a basic lack of understanding as to how the network "works." The concept that CALEA compliant network elements can be designed with no consideration being given as to the amount of traffic they will be required to isolate for the purposes of law enforcement is absurd. Capacity is a fundamental part of the design and engineering of any switch or other network element.

III. THE DOJ/FBI'S RECOMMENDATIONS WITH REGARD TO IMPLEMENTATION DEADLINES AND LOGISTICS ARE SPECULATIVE AND INFEASIBLE.

The DOJ/FBI states that compliance should be required no later than 18 months after the new standards are published. If the Commission directs the industry to promulgate new standards, then the DOJ/FBI asserts the deadline date for compliance with the new standards should be no later than 24 months after the release of the Report and Order. However, the DOJ/FBI decrees that, in no event, should any further extensions of the compliance deadline be granted.⁹

Again, the DOJ/FBI's ignorance of what is required to implement CALEA compliance is demonstrated by its position. At this point, it is irresponsible to speculate as to the amount of time which will be required should the Commission adopt additional items as part of the industry technical standard. The complexity of implementing these new measures, not the DOJ/FBI, will dictate when compliance logistically can be achieved. Manufacturers cannot design, test, develop, manufacture and distribute the compliant equipment in the absence of a firm standard. Until manufacturers provide this equipment, carriers cannot test and deploy the equipment. Any deadline established now, without an unequivocal standard being established, is speculative at best, which is why

⁹ DOJ/FBI Comments, pp.29-30.

the DOJ/FBI's insistence that the Commission adopt a blanket prohibition against any further extensions is obviously ill-advised.

The DOJ/FBI's position in this regard is particularly ludicrous given the fact that the one extension, which has been granted by the Commission, was necessitated in no small part by the intransigence and uncooperative attitude of the DOJ/FBI. Congress recognized the complexity of CALEA implementation by granting the Commission the authority to grant more than a single extension and creating a specific procedure for such requests.¹⁰ Even if no additional items were added to the interim technical standard, it is questionable whether compliance can be achieved by the current deadline. For example, some carriers already have received "verification statements" that CALEA compliant features for FlexANI cannot be developed by the deadline date. To adopt a blanket prohibition would be to ignore the realities of the marketplace and the effort and time required to implement CALEA compliance.

The DOJ/FBI also takes issue with the Commission's intent to permit Subcommittee TR45.2 to develop the technical specifications for compliance with the final industry standard. The veiled threat of a legal challenge should not deter the Commission from its well-established precedent of permitting those with the technical expertise to develop technical specifications. There is no reason to assume, as the DOJ/FBI argues, that this Subcommittee will flaunt the industry standard. The DOJ/FBI's ignorance of the long-standing synergies which exist between the Commission and industry entities and the efficiencies inherent in this approach is revealed in its cavalier statement that this task is an obligation of the Commission. Moreover, that the DOJ/FBI, which has on numerous occasions revealed its ignorance of technical requirements and the telecommunications network, should develop the technical specifications if the experienced Subcommittee is unable to do so within an 180 day timeframe is a terrifying and audacious proposition. Law enforcement should be more

¹⁰ 47 U.S.C. 1006 (c).

concerned with those activities it understands and leave the running of the telecommunications business to the industry and the Commission. The Commission is well aware of its obligations and what is required in order to withstand a legal challenge; it does not need to take lessons from the DOJ/FBI. However, SBC would welcome the Commission's monitoring of the process as a deterrent to future delaying tactics by the DOJ/FBI.

IV. THE DOJ/FBI HAS FAILED TO DEMONSTRATE THAT ITS PUNCH LIST ITEMS ARE REQUIRED UNDER SECTION 103 OF THE ACT TO BE INCORPORATED AS PART OF THE FINAL INDUSTRY STANDARD.

The DOJ/FBI raises no new arguments and presents no additional evidence in support of the inclusion of its punch list as part of the industry technical standard. For this reason, SBC's Comments submitted to the Commission on December 14, 1998, are sufficient for purposes of refuting the DOJ/FBI's contentions in this regard. However, with regard to specific items, SBC wishes to emphasize its position.

First, in relation to the DOJ/FBI's claim that "...if the subscriber's equipment, facilities or services are still used to maintain the conference call when the subject drops off and the call is rerouted – as will ordinarily be the case – then the carrier's obligation under Section 103(a)(1) I is unchanged...",¹¹ it is incorrect to classify these situations as the norm. For example, in cases where a dial-in conference or other conference bridge is involved, where the subscriber/subject did not initiate the bridge, then the subscriber/subject's equipment, facilities and services are not being used to maintain the call.

Similarly, the DOJ/FBI's statement that when a carrier routes an ongoing communication through another service area, Section 103(a)(1) requires the carrier continue to provide access to the call,¹² reflects a basic misunderstanding of the network.

¹¹ DOJ/FBI Comments, p. 39.

¹² DOJ/FBI Comments, p. 40.

Such access is not reasonably available due to the logistics involved since it is not achievable at the subject IAP. It is simply not possible for one service provider to "hand off" the call to another service provider and continue to provide access to all legs of the conference call. All that CALEA requires and all that the carrier can provide is access to the single content path associated with the subject's own services, facilities and equipment.

With regard to the DOJ/FBI's continued insistence on an arbitrary timing requirement for the delivery of call-identifying information,¹³ SBC still again explains that the timing of the delivery is a function of network and equipment design. What is critical is the synchronization of timestamps within a switch to enable the accurate association of call content to call-identifying information, rather than the delivery time. This is fact, not conjecture. In light of these realities, the DOJ/FBI's imposition of a costly timing requirement in the milliseconds is unrealistic and unreasonable.


¹³ DOJ/FBI Comments, p.56.

V. CONCLUSION

Cost is of paramount importance, not only with regard to the determination of an industry technical standard but also in relation as to the measures which are "reasonably available." The position advanced by the DOJ/FBI discounts the clear meaning of the Act. To adopt a standard pursuant to a distorted interpretation of the Act's requirements would be a disservice to the telecommunications industry and would undercut the privacy rights of individuals.

Respectfully submitted,

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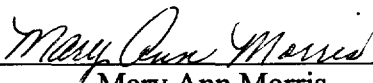
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January 27, 1999

Certificate of Service

I, Mary Ann Morris, hereby certify that the foregoing "Reply Comments of SBC Communications, Inc." in CC Docket No. 97-213 has been served on January 27, 1999 to the Parties of Record.



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